

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE
SUBSTANTIAL DEVELOPMENT AND
VARIANCE PERMIT DENIED BY KING
COUNTY TO MICHAEL J. ALLAN,

MICHAEL J. ALLAN,

Appellant,

v.

KING COUNTY and STATE OF
WASHINGTON, DEPARTMENT OF
ECOLOGY,

Respondents.

SHB No. 84-5

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the request for review of King County's denial of a substantial development and variance permit to Michael J. Allan, came on for hearing before the Shorelines Hearings Board; Gayle Rothrock, Lawrence J. Faulk, Richard A. O'Neal, Nancy R. Burnett, and Rodney Kerslake, Members, convened at Des Moines, Washington, on May 21 and 22, 1984. Administrative Appeals Judge William A. Harrison presided.

Appellant appeared by his attorney, Alan Merson. Respondent King

County appeared by Phyllis K. MacLeod, Deputy Prosecuting Attorney. Respondent Department of Ecology appeared by Jay J. Manning, Assistant Attorney General. Reporters Nancy A. Miller and Bibiana Carter recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Shorelines Hearings Board makes these

FINDINGS OF FACT

I

This matter arises on Three Tree Point in King County. Three Tree Point protrudes into Puget Sound.

II

The area in question, on the south shore of Three Tree Point, was platted in 1919. A right of way parallel to the shore was dedicated which now contains SW 172nd Street, a county road. The right of way includes not only the street but extends to, or close to, the waters of Puget Sound.

III

Over time, residences were constructed landward of the street. These are constructed close together with an appearance reminiscent of urban row houses except that each is free standing. On the water side of the road each home has a bulkhead constructed upon the county right of way. These were erected by the home-owners at various times and at various distances from the water. Collectively, these form a barrier which protects the shore, street, and homes from winter storms. The

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1 waves during winter storms crash against the bulkheads often carrying
2 drift logs or other debris. Storm winds can reach fifty miles per
3 hour at the site.

4 IV

5 There is a proliferation of accessory buildings upon the right of
6 way between the street and bulkheads. Most of these are garages or
7 storage structures for the corresponding home across the street. Two
8 buildings are accessory residences, one approved before and one after
9 the Shoreline Management Act of 1971.¹

10 V

11 Appellant Michael J. Allan purchased a lot, landward of the
12 street, in 1969. On this lot he built a two-bedroom home which he
13 rents to others. Appellant resides on Puget Sound at a location
14 several miles south of this site.

15 VI

16 Across the street and in front of appellant's lot, a horizontal
17 log bulkhead had been constructed on the county right of way about
18 thirty years ago. This bulkhead was destroyed by a storm in the
19 winter of 1981-82. The bulkhead formerly connected two other
20 bulkheads on either side of the site.

21 VII

22 In December, 1982, appellant applied to King County for a
23

24 1. The basis upon which King County approved the residence after the
25 Act was not fully established on this record.

1 shoreline substantial development and variance permit. The proposed
2 development consists of constructing a bulkhead 22 feet closer to the
3 water than the old bulkhead, but landward of mean higher-high water.
4 It also includes filling from the bulkhead landward and building a
5 "cabana" on the fill. The cabana would be 13 feet landward from the
6 face of the proposed bulkhead. The cabana would be 20 feet by 30 feet
7 with bath, kitchen and living-dining area. It would be suitable for
8 use as a residence either as an accessory use to the two-bedroom home
9 or a separate use in its own right. Appellant would not reside there
10 but would allow its use to others for the short- or long-term and for
11 day and night occupancy.

12 VIII

13 King County located a line of vegetation some ten feet landward of
14 the former location of the old log bulkhead on the site. It contends
15 that this is the ordinary high water mark.

16 IX

17 The King County Shoreline Master Program (KCSMP) designates the
18 site in question as within the "urban" environment. Within the urban
19 environment the following pertinent sections of the KCSMP apply:

20 Nonwater related development and residential
21 development shall not be permitted waterward of the
ordinary high water mark. Section 25.16.030(A).

22 Single family development, including floating
23 homes, shall not be permitted waterward of the
ordinary high water mark. Section 25.16.100(B).

24 Shoreline protection shall not be used to create
25 new lands...Sec. 25.16.180(F). "Shoreline
protection" means...bulkheads...Sec. 25.08.480.

1 Landfill may be permitted below the ordinary
2 high water mark only when necessary for the operation
3 of a water dependent or water related use, ...Section
4 2.16.190(B). "Water related use"...means...
5 residential development. Section 25.08.600(B).

6 Single family development shall maintain a
7 minimum setback of twenty feet from the ordinary high
8 water mark,...Section 25.16.100(c).

9 Accessory structures to the residence may be placed
10 within the required shoreline setback, provided:

11 A. No accessory structure, except swimming
12 pools, shall cover more than one hundred fifty square
13 feet;...Section 25.16.110(A).

14 Shoreline protection to replace existing
15 shoreline protection shall be placed along the same
16 alignment as the shoreline protection it is
17 replacing...Section 25.16.130(A).

18 On lots where abutting lots on both sides have
19 legally established bulkheads, a bulkhead may be
20 installed no further waterward than the bulkheads on
21 the abutting lots...Section 25.16.180(B).

22 X

23 King County denied appellant's application for a shoreline
24 substantial development and variance permit on December 14, 1983.
25 Appellant requested review by this Board of that denial on January 20,
26 1984. The date on which King County's decision was filed with the
27 State Department of Ecology is not stated on this record.

28 XI

29 Any Conclusion of Law which should be deemed a Finding of Fact is
30 hereby adopted as such.

31 From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

Appellant, the person requesting review herein, has the burden of proof. RCW 90.53.140(7).

II

Appellant did not prove that the line of vegetation is not the "ordinary high water mark" within the meaning of RCW 90.58.030(2)(b) which states:

(b) "Ordinary high water mark" on all lakes, streams, and tidal water is that mark that will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland, in respect to vegetation as that condition exists on June 1, 1971, as it may naturally change thereafter, or as it may change thereafter in accordance with permits issued by a local government or the department: Provided, That in any area where the ordinary high water mark cannot be found, the ordinary high water mark adjoining salt water shall be the line of mean higher high tide and the ordinary high water mark adjoining fresh water shall be the line of mean high water;

III

The proposed development is waterward of the ordinary high water mark. Because of this, the proposed cabana, which is capable of use as a single-family residence, is a prohibited use. KCSMP Section 25.16.030(A). The proposed landfill is a prohibited use also, in these circumstances. KCSMP Sections 25.16.190(B) and 25.08.600(B). The proposed bulkhead which, with the landfill, creates new land in these circumstances, is also a prohibited use. KCSMP Sections

1 25.16.180(F) and 25.08.480.

2 IV

3 The applicable criteria for variances is that adopted by the
4 Department of Ecology at WAC 173-14-150. KCSMP Section 25.32.040.
5 See also RCW 90.58.100(5). This provides, at WAC 173-14-150(5) that:

6 Requests for varying the use to which a shoreline
7 area is to be put are not requests for variances, but
8 rather requests for conditional uses. Such requests
shall be evaluated using the criteria set forth in
WAC 173-14-140.

9 V

10 The pertinent provision of WAC 173-14-140 states, at (3):

11 Uses which are specifically prohibited by the master
12 program may not be authorized.

13 Appellant's shoreline substantial development and variance requests
14 were therefore properly denied by King County.

15 VI

16 Even were appellant's proposed development not specifically
17 prohibited by the master program, his application would require a
18 variance from the twenty-foot setback requirement, KCSMP Sections
19 25.16.100(c). This is so whether the proposed cabana is a
20 single-family residence, id, or an accessory to the present
21 single-family residence since the cabana exceeds 150 square feet.
22 KCSMP Section 25.16.110)(a). The proposed bulkhead would also require
23 a variance from the requirements for replacement bulkheads to align
24 with the former bulkhead, KCSMP Section 25.16.180(A) and bulkheads on
25 either side, KCSMP Section 2.16.180(B). Such variances relate to

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1 dimensional requirements and are governed by WAC 173-14-150(3) and (4).

2 VII

3 The proposed cabana having kitchen and bath facilities is so
4 designed as to accommodate permanent residency. Its proximity to the
5 water places it and its occupants in peril during the winter storms
6 which break on that shore. Moreover, the normal privacy requirements
7 associated with a residence compel a degree of dominion over the site
8 inappropriate to a public right of way. The proposed cabana is not a
9 reasonable use of the property. Thus, appellant would not meet WAC
10 173-14-150(3)(a) and (b).

11 VIII

12 The proposed extended bulkhead and landfill would convert a
13 sizeable portion of public beach to essentially private use. In doing
14 so it would not only deprive the public of the use of that beach but
15 would also form an obstacle to walking the length of the public beach,
16 especially at high tides. Thus, appellant would not meet WAC
17 173-14-150(3)(c)(e) and (f).

18 IX

19 Although the proposed development might contain features which
20 others in the area presently enjoy, the combination of expanding the
21 bulkhead line waterward and constructing a residence has not been
22 allowed on this right of way since passage of the Shoreline Management
23 Act of 1971. The allowance of appellant's proposal would engender
24 similar requests from others with the result that the bulkhead line
25 would advance waterward, displacing the public as it goes. This

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1 cumulative effect would be inconsistent with the policy of the Act
2 that the public's opportunity to enjoy the physical and aesthetic
3 qualities of the natural shorelines of the state shall be preserved to
4 the greatest extent feasible consistent with the overall best interest
5 of the state and the people generally. RCW 90.58.020. Appellant
6 would not meet WAC 173-14-150(4).

7 X

8 Any Finding of Fact which should be deemed a Conclusion of Law is
9 hereby adopted as such.

10 From these Conclusions the Board enters this
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ORDER

King County's denial of the shoreline substantial development and variance permit requested by Michael J. Allan is hereby affirmed.

DONE at Lacey, Washington, this 22nd day of June, 1984.

SHORELINES HEARINGS BOARD

Gayle Rothrock
GAYLE ROTHROCK, Chairman

(See Concurring Opinion)
LAWRENCE J. FAULK, Vice Chairman

Richard A. O'Neal
RICHARD A. O'NEAL, Member

Nancy R. Burnett
NANCY R. BURNETT, Member

Rodney Kerslake
RODNEY KERSLAKE, Member

William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge

1 CONCURRING OPINION - FAULK

2
3
4 I concur with the result reached by the majority. I write
5 separately however to emphasize public access to the shoreline in
6 question which was not a direct issue in this case.

7 In walking along the water side of SW 172nd Street near Burien,
8 Washington, it occurred to me that even though this entire stretch of
9 beach is public right of way there is not one sign along SW 172nd
10 Street indicating that the public has a right to use this
11 approximately 1400 feet of waterfront.

12 There is a sign at the hairpin curve at Three Tree Point where it
13 turns and becomes SW 172nd Street. However the sign emphasizes those
14 things that cannot be done on the beach rather than the fact that it
15 is a public beach.

16 It seems to be that two or three signs should be placed along the
17 right of way so they could clearly be visible from a moving vehicle.
18 The signs should follow the design guidelines set forth on page 25 of
19 the report entitled "An Evaluation of Public Access to Washington
20 Shorelines" published by the Department of Ecology in September 1983.

21 It also seems reasonable that public walkways from the road to the
22 beach should be provided at the sign locations. This would make the
23 citizens more comfortable in using the beach. Finally, selected
24 parking areas should be provided in King County on the waterside of SW
25 172nd Street. This should be limited so that the entire shoreline

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1 does not become a parking lot.

2 I believe if the above were accomplished the citizens would gain
3 the public access to this stretch of public beach that was intended by
4 the Shoreline Management Act and the King County Shoreline Master
5 Program.

6
7  6/20/64
8 LAWRENCE J. FAULK, Vice Chairman
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